Working Paper 2015/005

The Corporate Responsibility to Respect Human Rights: A Status Review

Claire Methven O'Brien
Sumithra Dhanarajan

cob@humanrights.dk
s.dhanarajan@u.nus.edu

[May 2015]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: http://law.nus.edu.sg/wps/

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Claire Methven O'Brien[1] and Sumithra Dhanarajan[2]

ABSTRACT

This article provides a critical analysis of developments from 2011 to date relating to the Second Pillar of the United Nations Guiding Principles on Business and Human Rights, the corporate responsibility to respect human rights. The article first briefly contextualises the corporate responsibility to respect human rights as articulated by the UN Guiding Principles on Business and Human Rights with regard to international human rights law as it currently stands. It then describes and analyses new norms and emerging practices in six areas where the UN Guiding Principles on Business and Human Rights call for a response from business and governments: human rights due diligence, corporate policies on human rights, human rights impact assessment, remediation of corporate human rights abuses, supply chain responsibility and transparency, and corporate reporting of human rights impacts. Throughout, the article includes a focus on examples from Asia and Europe. The article concludes by cautioning the need for continuing evaluation of the effectiveness of current approaches to implementing the UN Guiding Principle in securing respect for human rights in practice and the validity of their underlying assumptions.

Key words: Human rights, corporate responsibility to respect human rights, UN Guiding Principles on Business and Human Rights, human rights due diligence, human rights impact assessment, non-financial reporting, supply chains, sustainability

[1] PhD, Strategic Adviser, Human Rights and Development Department, Danish Institute for Human Rights, and Research Fellow, Department of International Law, University of Groningen (cob@humanrights.dk).
[2] Doctoral candidate and Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore (s.dhanarajan@u.nus.edu).

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Claire Methven O'Brien
Human Rights and Development Department, Danish Institute for Human Rights

Sumi Dhanarajan
Centre for Asian Legal Studies, National University of Singapore

1. Introduction

The United Nations (UN) Human Rights Council's Protect, Respect and Remedy (or 'Three Pillar') Framework on Business and Human Rights and the Guiding Principles on Business and Human Rights (GPs) represent a significant marker in the contemporary evolution of norms and standards on the responsibility and accountability of corporate actors for their social, environmental and human rights impacts (United Nations Special-Representative of the Secretary-General (UN Human Rights Council (UNHRC) 2008, UNHRC 2011).

From an ethical viewpoint, international human rights standards such as the Universal Declaration of Human Rights (UN, 1948) and subsequent international and regional human rights instruments ought to have provided the natural frame for increasingly frequent attempts by victims or their representatives, during the 1980s and 1990s, to seek redress for business-related infractions of their dignity, fundamental interests, well-being and welfare (Dhanarajan and Methven O'Brien, 2015). Yet legal as well as political obstacles stood in the way of using human rights instruments and courts to challenge corporate wrongs.

Top amongst these, historically, was the limited application of human rights obligations to non-state actors and in the "private sphere" (Clapham, 1996). International law, and thus international human rights law, does not in general establish direct duties on businesses, even if they may have limited direct obligations, in certain circumstances, under international environmental law, humanitarian and criminal law, for instance, while also being subject to human rights standards indirectly, via their duty to comply with relevant national laws in each state, respectively, in the areas of labour and environment, non-discrimination, intellectual property, privacy and product safety, for example.

However, the latter assumes that the domestic laws of states are in turn fully aligned with their international human rights obligations and, in addition, that businesses comply with national rules and requirements. Although in various jurisdictions, businesses do, to a large extent, respect human rights, via this route, in others governments have failed to enact sufficiently demanding legal standards or to challenge breaches of the law by businesses where these occur. While often thought of as a phenomenon particularly affecting emerging economies, given TNCs' status as vehicles of much-needed foreign direct investment, in the wake of liberalisation, market integration and 'regulatory competition,' some have suggested that downwards pressure on social and environmental standards may be of more general affect (Davies, 2008; Davies and Vadlamannati, 2013).

Through the 1990s, most businesses, for their part, actively resisted any expansion of the scope of the social 'licence to operate' to encompass human rights, despite mounting evidence of abuses (Dhanarajan and Methven O'Brien, 2013), leading to widespread frustration culminating in popular protests such as the 1999 'Battle of Seattle'. When, in 2005, John Ruggie was appointed as UN Secretary-General's Special Representative on Business and Human Rights (SRSG), one attempt in the UN to transact human rights norms for business had already failed to garner support from government, business and even labour organisations (UN Sub-Commission on the Promotion and Protection of Human Rights, 2003, Methven O'Brien 2009). By contrast with the approach adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, which had sought to specify substantive corporate human rights duties that were broadly co-extensive with those of government, Ruggie publicly accepted that human rights laws did not place direct obligations on companies from the outset. Accordingly, he gave greater emphasis to human rights norms' ethical and moral character, with regard to business, than to seeking out their potential legal ramifications. Moreover, he was open in his intention that his mandate should succeed politically, explicitly espousing an approach of "principled pragmatism" which, he hoped, would result in broad support by states and business for his recommendations, and hence "reduce corporate-related human rights harms to the maximum extent possible in the shortest possible period of time" (Ruggie, 2008). In the SRSG's view, negotiations towards an international treaty on business and human rights, on the other hand, would take years, and risked the delivery of a lowest common denominator result (Ruggie, 2013).

In consequence, the GPs maintain as primary the legal duty of States to protect human rights, consistently with the conventional restrictions of international human rights law. At the same time, however, the GPs explicitly recognise a corporate responsibility to respect, and not harm, human rights, as a societal expectation deriving from, albeit not sounding in, international human rights treaties, to be given effect through dedicated corporate policies and internal measures, which the GPs outline, as well as by supportive regulatory frameworks. A third "pillar" of the UN Framework recognises the right to an adequate remedy of victims of business-related human rights abuses (SRSG, 2011).

Arguably, the GPs thus contributed to preserving the legitimacy of human rights through a re-orientation of norms, if not laws, to address the growing power and impacts of business in society, so maintaining their relevance to lived experiences of indignity and injustice amongst peoples worldwide. Within a short space of time, a range of international organisations, such as the OECD (OECD, 2011), investors and national governments, in particular, through the vehicle of national action plans on business and human rights (Methven O'Brien *et al* 2014, Methven O'Brien *et al* 2015). Yet doubts persist about the GPs' practical effectiveness, given their non-mandatory or 'voluntary' nature. For example, though the GPs recommend it, after five years of their existence, less than 350 of 80,000 or so transnational firms have a human rights policy (Business and Human Rights Resource Centre, 2016). While their rhetoric may have captured the policy-making "peaks", such data suggests that uptake of the GPs on the ground remains slow, prompting claims by some that "firms are still not ready to be safe rather than sorry" (Aaronson and Higham, 2013, p. 333). On the other hand, while it may be the case that only law can bind (Bilchitz, 2013), would international legal rules necessarily yield better results, in terms of increased awareness, implementation and enforcement? A "hard" law, punitive approach has long had its own sceptics, including where corporations are its targets, even at the domestic level (Ayres and Braithwaite, 1992; Black, 2001; Methven O'Brien, 2009; Ford, 2015). Numerous studies have shown the significance of broader social factors, both internal and external to regulated companies, to achieving, or frustrating compliance, beyond the legal or non-legal character of the rules in question (Gunningham *et al*., 2003), while recent scandals apparently continue to bear this out (Russell *et al*, 2016). If these questions are still not settled scientifically, neither is their political debate over. In June 2014, the UN Human Rights Council adopted two human rights and business

resolutions. One maintained strong support for the GPs (United Nations Human Rights Council (UNHRC), 2014a), whilst the other sought the establishment of an intergovernmental working group with a mandate to elaborate an international legally binding instrument on human rights and transnational corporations (UNHRC, 2014b).

This article reviews selected developments since 2011 in order to offer a preliminary assessment of how, to date, the GPs' corporate responsibility to respect human rights has been interpreted, and to what extent it may be seen to have been operationalised, through government action, business behaviour and the praxis of other social actors. Section 2 first sketches the process of human rights due diligence, by which, the GPs maintain, business respect for human rights is to be achieved. This provides the setting for sections 3 through 7 which consider, in turn, the following elements of corporate human rights due diligence encompassed by the GPs: establishing a corporate human rights policy (section 3); the undertaking of human rights impact assessment (section 4); integrating findings of impact assessment (section 5); and corporate human rights reporting (section 6). Section 7 concludes.

2. Human rights due diligence

The GPs state that the corporate responsibility to respect human rights, which forms the second "Pillar" of the UN Framework on business and human rights, requires businesses both to avoid infringing human rights and to address adverse human rights impacts in which they may be involved. Businesses should thus seek to prevent or mitigate impacts that they have "caused or contributed to", as well as those "directly linked" to their operations, products or services through their business relationships, whether contractual or non-contractual (UNHRC 2011, GP13). Given its ethical rather than legal basis, in scope, the corporate responsibility to respect human rights refers to all relevant internationally-recognised human rights, not just those formally applicable in any one particular jurisdiction (UNHRC 2011, GP11).

The GPs afford a central role to "human rights due diligence", a process which, they indicate, should enable any corporation to achieve full respect for all human rights, if executed correctly. A business' first step, in undertaking this process, according to the GPs, should be to adopt and publish a policy commitment to respect human rights (GP15). Thereafter, due diligence is

envisaged to comprise four steps, in form resembling a typical continuous improvement cycle (UNHRC 2011, GPs17-20):

1) Assessing actual and potential impacts of business activities on human rights ("human rights risk and impact assessment");
2) Acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;
3) Tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts; and
4) Communicating publicly about the due diligence process and its results.

In light of the "third pillar" of the UN Framework, access to remedy, companies should also take steps to remediate any adverse impacts of their activities on rights-holders (UNHRC 2011, GP22).

Due to the broad scope of the corporate responsibility, as mentioned above, human rights due diligence should encompass consideration of business impacts, at a minimum, on all human rights enumerated in the *International Bill of Human Rights*,[1] the labour standards contained in the International Labour Organisation's *Declaration on Fundamental Principles and Rights at Work* (International Labour Organisation (ILO), 1998) and, based on businesses' specific circumstances, additional standards, such as those relating to indigenous peoples (ILO, 1989; UN General Assembly, 2007) or conflict-affected areas (UNHRC 2011, GP12). This breadth does not however imply that human rights due diligence automatically becomes unwieldy. According to the GPs, it remains practicable because companies are permitted to adjust the scale and intensity of the cycle of measures indicated according to their specific character and context, taking into account factors such as size, industry sector, and the seriousness of human rights impacts to which the company's activities may give rise (UNHRC 2011, GP14).

Notable, in recent years, has been the emergence of a limited but growing tendency towards government directives or legislation encouraging or requiring human rights due diligence of one form or another. Though overlapping with the period of development of GPs, this trend undoubtedly aligns with the GPs' vision. Many such measures, though not all (U.S. Treasury Department, 2013) have addressed the specific issue of conflict minerals. Passed in early 2010, Section 1502 of the U.S. Dodd Frank Wall Street Reform and Consumer Protection Act, for

example, prepared the way for later rules that would require all companies listed with the United States (U.S.) Securities and Exchange Commission (SEC) to carry out due diligence to a nationally or internationally recognised framework, in order to determine whether their products contain minerals used to fund armed groups in the Democratic Republic of Congo (DRC) or bordering countries (U.S. Congress 2010; U.S. Securities and Exchange Commission, 2012).

Later on in 2010, the UN Security Council endorsed due diligence for all companies sourcing minerals from DRC (United Nations Security Council, 2010), and in 2013 the OECD published *Due Diligence Guidance for Responsible Supply Chain of Minerals concerning the sourcing of natural resources from conflict-affected and high-risk areas* (OECD, 2013). Subsequently, twelve African states of the International Conference of the Great Lakes Region (ICGLR) have made fulfilment of the OECD's due diligence requirements a condition of companies' participation in their regional mineral certification scheme. At the national level, the Congolese government introduced legislation requiring companies operating in its tin, tantalum, tungsten or gold mining sectors to undertake supply chain due diligence according to the OECD standard in 2012, and Rwanda's government has adopted similar legislation (Global Witness, 2014). Also drawing on the OECD Guidance, the European Commission has proposed a regulation to establish a voluntary self-certification scheme for the 300-400 companies that import tin, tantalum, tungsten and gold ores and metals into Europe (European Commission 2014a). In 2015, the Chinese government, through the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters launched draft *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, 2015).

Together, these measures would appear to have prompted some significant changes in companies' sourcing practices and, albeit assessments differ, to the situation on the ground at mines in conflict-affected areas (Enough Project, 2015; c.f. Wolfe, 2015). By contrast, a cost-benefit analysis undertaken on behalf of the European Commission in 2013 revealed that only 4 per cent of 330 companies surveyed were voluntarily preparing a public report on how they identify and address the risk of funding conflict or abuses in their supply chains (European Commission, 2014b)[2]. Another recent survey of 186 European companies found that over 80 per

cent did not provide any public information about checks they might have undertaken to ensure their supply chains had not funded conflict or human rights abuses (SOMO, 2013). Such data provide the basis for persisting scepticism, particularly on the part of civil society organisations, concerning the efficacy of a voluntary approach to due diligence, even in relation to specific risks of egregious abuses linked to conflicts. Reflecting this, initiatives have recently been introduced, with strong support from CSOs, via legislatures in both Switzerland and France, that aim to establish legal obligations on companies of certain categories to undertake general human rights due diligence, with penalties attaching to defaults (Swiss Coalition for Corporate Justice, n.d.; Assemblée Nationale, 2016).[3]

Whereas neither initiative has yet resulted in legislation, facing a variety of technical and political obstacles (Amnesty International, 2015), the use of corporate reporting requirements to encourage due diligence indirectly has in some cases been adopted as an alternative, and less controversial, approach. The US government, for example, enacted legislation obliging companies to publish information on their policies and processes, including those intended to prevent and mitigate risks relating to human rights, in connection with new investments in Myanmar (U.S. Treasury Department Office for Assets Control (2013); U.S. Department of State, 2013). Subsequently, the United Kingdom (UK), passed the Modern Slavery Act 2015, which asks commercial organisations that conduct all or part of their business in the UK, and supplying goods or services with a turnover of £36m or more, to prepare and publish an annual “slavery and human trafficking” statement (UK, 2015). Such a statement, the Act indicates, should set out the company’s policies on slavery and human trafficking; steps that the business has taken, during the financial year, to ensure that slavery and human trafficking are not taking place anywhere in its supply chains or in any part of its own business, including its due diligence processes; an assessment of the parts of its business that pose a risk of slavery and human trafficking; steps taken to assess and manage such risks; their effectiveness, measured against appropriate performance indicators; and any relevant training provided to staff. If the Act still follows a ‘comply or explain’ approach, leaving open the possibility that a company will simply report that no anti-slavery or trafficking measures have been taken, failure to make any statement at all is punishable via civil proceedings. Such models, we suggest, helpfully illustrate that reality rather

comprises a wide range of possible “shades of bindingness” (or, alternatively “shades of voluntariness”) than the over-simplified extremes of freedom and coercion sometimes implied by contributions to the “GPs versus treaty” debate. In this context, notably, the potential to enhance uptake of due diligence via fiscal measures should be further explored (Methven O’Brien, 2016).

3. Human rights policies

While there can of course be no guarantee that paper promises turn into reality, without an explicit written commitment, systemic change within a business towards respect for human rights can be seen to be unlikely; at a minimum, a company human rights policy should help gradually to raise awareness of the need to consider human rights impacts. According to the GPs, a high-level policy statement expressing company commitment to respect human rights is pre-requisite to effective due diligence: only board-level buy-in will give a policy the weight required to secure its proper implementation, especially in the face of conflicting business imperatives. A company’s human rights policy should furthermore be public, so that external stakeholders have a clear platform for engagement with, and scrutiny of, companies affecting them (UNHRC 2011, GP16).

While the GPs’ expectations of companies in this area appear straightforward, establishing the extent of their influence on corporate conduct with certainty is not easy on the basis of available data. A paper published by the SRSG in 2006 reported that, amongst a (non-representative) sample of Fortune 500 companies, where respondents were mainly based in the US and Europe, ninety per cent indicated that they had an explicit set of principles or management practices in place with regard to human rights (Ruggie, 2006). But a 2010 analysis of policies of the FTSE100 found 42.8% did not address human at all, and also questioned the completeness of business commitments to human rights where they did feature in company policies (Preuss and Brown, 2010). Two years after the UN HRC’s endorsement of the GPs, in 2013, a non-randomised survey of 153 companies, of all sizes and from 39 countries, undertaken by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, found fifty eight per cent had a public statement on human rights (United Nations General Assembly (UNGA), 2013). Yet by 2016, the Business and Human Rights Resource Centre, which has begun to document published company policies on human rights, currently lists less than three-hundred

and fifty, out of a population of 80,000 or so transnational firms worldwide, as noted earlier (Business and Human Rights Resource Centre 2016)[4].

To further complicate matters, companies participating in the UN Global Compact (UNGC) currently numbering around 8,000 (UNGC 2016a; UNGC 2016b) or stating support for the Organisation for Economic Co-operation and Development's (OECD) *Guidelines for Multinational Enterprises* (OECD, 2011) are now implicitly committed to respect for human rights. However, a 2013 study for the European Commission assessing 200 randomly-selected large European companies found that only 33% referred to the UN Global Compact, OECD *Guidelines for Multinational Enterprises*, or International Standards Organisation's (ISO) ISO 26000 Social Responsibility guidance (ISO 2010), only 3% to the UNGPs themselves, and 2% to the ILO's *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration) (ILO 2006; European Commission, 2013). Unremarkably, the same study found that very large companies (those with over 10,000 employees) were more likely to refer to international standards in their CSR policies than smaller companies. More interesting, however, was that it also detected variation between surveyed countries in terms of the likelihood that companies have a human rights policy, suggesting that national factors, such as government encouragement of corporate social responsibility (CSR) or business ethics, can influence company behaviour, even in the absence of coercive legal rules. Given this, at least from the viewpoint of corporate "early adopters" of human rights policies, government measures to promote their development by other businesses ought to be welcome, as likely to help 'level the playing field' (DIHR, ICAR and GBI, 2014).

4. Human rights impact assessment

Human rights impact assessment (HRIA) is the first step in the GPs' due diligence process. An adverse human rights impact may be said to occur when an action removes or reduces the ability of an individual to enjoy his or her human rights (International Business Leaders' Forum and International Finance Corporation, 2010). Companies can be connected to adverse human rights impacts in a number of distinct ways. According to the GPs, they are potentially responsible for: a) *causing* a human rights impact through intended or unintended actions, for example, deliberate discrimination in hiring practices, or accidental pollution of a local waterway; b) *contributing to* a

human rights impact, by being one of a number of entities whose conduct together curtails human rights, for instance, where a global brand changes its order specifications at short notice so that its suppliers breach labour standards in fulfilling it; or c) impacts *directly linked* to a business' operations, products or services, through its business relationships, including those with suppliers, joint-venture partners, direct customers, franchisees and licensees (UNHRC 2011, GP13).

The GPs indicate that companies should, in the course of performing an HRIA, draw on internal or independent human rights expertise; undertake meaningful consultation with potentially affected rights-holders and other relevant stakeholders; consider human rights impacts on individuals from groups that may be at heightened risk of vulnerability or marginalisation, and gender issues; and repeat risk and impact identification at regular intervals, for instance, before entering into a new activity, prior to significant decisions about changes in activities, and periodically throughout the project lifecycle (UNHRC 2011, GP18).

Although the GPs' guidance on HRIA remains high-level, without providing detailed descriptions of an HRIA process or orientation on how HRIA should be adapted to particular industries or contexts, a variety of initiatives have materialised attempting to address these *lacunae*. Guidance has been published, for example, on HRIA for particular sectors (International Council on Mining & Metals (ICMM), 2012; IPIECA and DIHR, 2013; NomoGaia, n.d.), and for thematic HRIAs, for instance, focusing on the rights of children (UNICEF, 2014) and indigenous peoples (e.g. IBIS Denmark, 2013, International Work Group of Indigenous Affairs, 2014). Individually, some companies have devised methodologies for impact assessment in connection with specific issues frequently arising in their own operating environments (Coca-Cola Company, 2011). So far, however, only a small handful of HRIAs undertaken by companies have been published (Goldcorp, 2010, Nestlé and the Danish Institute for Human Rights, 2013), making their prevalence hard to ascertain (though this ought to change as new requirements on companies to report on human rights due diligence take effect, see further section 6). Most company-level HRIAs about which at least some information has been disclosed, moreover, have met with criticism from civil society stakeholders *inter alia* for being too restrictive in scope or for the methodology adopted. Thus, civil society organisations and national human rights institutions (NHRIs) are also undertaking

HRIAs (Hamm et al., 2013), which typically go beyond current corporate practice, for instance, in terms of involving rights-holders, transparency and disclosure (International Federation for Human Rights, 2014; Danish Institute for Human Rights (DIHR), 2016; International Centre for Human Rights and Democratic Development, n.d).

Thus, the parameters and process of HRIA under the GPs remain emergent and contested, with a number of issues for now left unresolved. One such question is whether HRIA should be integrated into environmental or social impact assessment processes, particularly where these are provided for by statute or licensing regulations, or undertaken as a separate, "stand-alone" exercise (IPIECA and DIHR 2013, DIHR 2016). Others relate to the issues of independence, and equality of arms, in the conduct of impact assessments, and how to achieve these, given power asymmetries between companies and communities that can taint assessments facilitated by company personnel, but also where legislation provides for community consultation to be undertaken by public bodies, who themselves may be, or may be perceived to be, interested parties in the outcome of an HRIA (Schilling-Vacaflor, 2012). Still further questions relate to the potential value of "strategic" or sector-wide HRIA, mirroring environmental practice (Myanmar Centre for Responsible Business, 2013); the role in HRIA of human rights indicators (DIHR, 2016); the value of risk-based approaches (Taylor et al., 2009), and of the notion of "impact" assessment itself (Boele and Crispin, 2012).

5. Integrating findings

Once an assessment is completed, the GPs call for businesses to respond to its findings, so as to prevent future human rights abuses and address any existing ones that may have been uncovered. Clearly, the potential range of actions required of companies is broad. Internally, a company might need to amend recruitment processes or contractual terms for employees; change its purchasing, sales or marketing practices; improve worker accommodation; or introduce due diligence for land acquisitions, for example. In addition, implementing such changes will usually require the allocation of new resources, for instance, for training and awareness-raising, monitoring and management of human rights impacts on a continuous basis (Gap Inc., n.d.; Nestlé Global, n.d.). Businesses are expected to address all their actual or potential impacts, though they may prioritise: the GPs recommend that companies first seek to prevent and mitigate their severest

impacts, or those where a delay in response would make consequences irremediable (UNHRC 2011, GP24).

Where impacts are *caused* by elements within the business itself, it should cease or prevent the impact, and provide for, or collaborate in, remediation. If a company has *contributed to* or is *directly linked* to impacts, it should cease its own contribution, exercise leverage over any other entities involved, and provide, or cooperate in, remediation. According to the GPs, 'leverage' is a company's ability to effect change in the wrongful practices of an entity, be that another business, or a public actor, with which it has a relationship. Modalities of leverage are thus numerous, ranging from capacity building to amending contract terms for suppliers (Shift, 2013a). If a company has leverage over a business partner, it is expected to exercise it. If, on the other hand, the company lacks leverage, it is expected to seek ways to increase it, for example, by offering incentives, or applying sanctions to the relevant entity, or collaborating with others to influence its behaviour. Where risks or impacts derive from a company's business relationships, rather than from its own activities, the GPs further require it to consider, in determining appropriate remedial measures, *inter alia* how crucial the relationship is; the severity of the actual or possible abuse; and whether terminating the business relationship would itself have adverse human rights consequences (UNHRC 2011, GP19; cf. Wood, 2011).

Though the GPs' concept of leverage may seem straightforward, views frequently differ on its practical application. Banks, for example, have tended to emphasise constraints on their leverage over those they lend to (Thun Group of Banks, 2013) while outsiders argue that, as controllers of access to credit, they often wield great influence over clients (BankTrack and The Berne Declaration, 2012; Myerstein, 2013) while they also have good opportunities to 'piggy-back' human rights screening onto anti-corruption due diligence obligations to which banks are already subject in many jurisdictions (Finance Against Trafficking, 2014; UNEP Finance Initiative, 2014). The question of whether financial actors with a minority shareholding in another business can be said to be "directly linked" to that business' adverse human rights impacts, and therefore expected to exercise leverage, has also drawn disagreement, resulting in two complaints ("specific instances") brought under the OECD Guidelines for MNEs (OECD, 2011) in relation to investments

by Norway's Government Pension Fund Global and the Dutch Pension Fund in a proposed iron mining development in India. These proceedings yielded findings that a minority shareholding does provide a sufficient basis for extending responsibility to investors failing to exercise due diligence that would have identified, and hence prevented, impacts negative (Ruggie and Nelson, 2015). Although the OECD's Working Party on Responsible Business Conduct in turn accepted this principle, the detail and complexity of its guidance on how to ascertain the scope of minority investors' due diligence obligations appears to leave much room for uncertainty, and hence scope for further disputes, in the future (OECD, 2014).

Another query concerning leverage concerns companies' ability to influence the use of their products by customers (OECD Watch, 2014), especially with regard to policing and military supplies, information technology, surveillance equipment and other dual use technologies (Cohn et al., 2012; Wagner, 2012; Frediani, 2014; Global Voices Advocacy, 2014). Though the export of such products may be permissible under national standards, the GPs require companies to look beyond formal legality in order to ascertain whether, in reality, their products or services facilitate human rights abuses (Marotta, 2013). More complex still is the question of the responsibility and leverage of internet service providers and social media platforms to prevent their use as a medium for hate speech and the organisation of criminal acts, especially given the need, on the other hand, to ensure any restrictions on freedom of expression and privacy are lawful, rational and proportionate (Council of Europe, 2014; Essers, 2014).

Yet companies' failures to remediate more general supply chain responsibility issues probably remain the biggest problem of all for the GPs. Ethical supply chain codes of conduct ranked amongst the earliest business and human rights initiatives, significantly pre-dating the GPs. Though their uptake by many consumer-facing companies was relatively rapid, strong critiques emerged equally quickly. On one hand, third-party social auditors were revealed often to rely on a superficial 'tickbox' approach to monitoring of workplace standards on behalf of purchasers. On the other, lack of coordination amongst purchasers was suggested to lead to 'audit-fatigue' amongst inspected businesses (Methven O'Brien, 2009, Prepscius, 2012). Subsequent developments aimed to address such problems, for example, through the launch of virtual data-

sharing platforms (Sedex, 2014) and an increasing emphasis on capacity strengthening measures for suppliers along with other stakeholders (Shift, 2013b).

Notwithstanding such evolutionary developments, the persistence of serious abuses in the supply chains of large, resource-rich corporations continues to cast doubt on their will to prevent these (Ross, 2011; Clean Clothes Campaign, 2014). In 2013, over 1000 mainly female garment workers were killed and more than 2500 injured in the Savar building collapse. Various factors contributed to the "Rana Plaza" disaster, amongst them breaches of construction, health and safety regulations and labour standards by local suppliers based in the factory, under contract to large numbers of well-known European and American brands, as well as defective inspection arrangements and social audits, on the part of purchasers, that failed to detect them. Albeit these problems, as well as a broader context of exploitation and marginalisation of female garment workers in Bangladesh, were widely documented (Alam and Blanch, 2011) and had led to other workplace disasters before (Absar, 2002; Foxvog *et al*., 2013), the Rana Plaza catastrophe, because of its horrendous scale, attracted public attention and outrage, and triggered a significant multi-actor mobilisation. Brands were convened by the ILO and global unions to coordinate an *Arrangement* for the payment of compensation to workers (ILO, 2013). In May 2013, within a few weeks of the tragedy, brands and retailers entered into a 5-year binding agreement with Bangladeshi and global trade unions. The *Accord on Fire and Building Safety in Bangladesh* commits more than 150 companies to collaborative efforts to ensure safety in almost half of the country's garment factories, through measures such as independent inspections by trained fire and building safety experts; public reporting; mandatory repairs and renovations to be financed by brands; a central role for workers and unions in both oversight and implementation; supplier contracts with sufficient financing; and adequate pricing and worker training (*Accord on Fire and Building Safety in Bangladesh*, 2013; Foxvog et al., 2013). Other international organisations have sought to support these efforts (OECD, 2014a). Still, various companies have refused to sign the *Accord*, opting instead for non-binding commitments to improved factory safety. Moreover, the *Rana Plaza Donor's Trust Fund,* set up under the *Accord* had in 2014 received only half the US$40million needed to compensate workers or their families, while only half the companies

associated with factories in the collapsed building had contributed to the fund at all (Clean Clothes Campaign, n.d.).

To be sure, chronic patterns of default can be indicative of the existence of real, systemic challenges in controlling standards throughout global value chains in an environment where purchasers, suppliers and workers are exposed both to intense global competition, and local social, political and economic factors that can undermine respect for human rights. Moreover, while in some sectors, supply relationships may be relatively static and concentrated (Guglielmo, 2013) contractual networks are as dynamic as they are vast for many companies. Commodities can present their own distinct, if not unsurmountable, challenges, for instance, in terms of traceability (United Nations Global Compact and BSR, 2014). Still, even if the concerted multi-actor, multi-level response to Rana Plaza described above can be viewed as embodying some positive innovations, in governance terms, the fact remains that it is far 'too little, too late' for the families of those who were injured or perished. Inevitably, as long as such man-made disasters continue, calls for 'hard' international human rights law interventions to hold buyers responsible for the delinquencies of their supply chain will continue to be heard, well-founded or not.

6. Corporate human rights reporting

With the rise of ethical investment, and increasing recognition of the materiality of social and sustainability issues (Hopwood et al., 2010; Unerman and Zappettini, 2014), corporate sustainability reporting, as a device by which companies can be held accountable to markets and stakeholders, has become increasingly prominent, to the extent that some suggest there has been a "disclosure revolution" (Cooper and Owen, 2007; Hohnen, 2012). In line with this trend, which of course began long before the advent of the GPs (Islam and McPhail, 2011), the final step called for by the GPs' due diligence process is for businesses to "communicate" on how they are addressing their human rights impacts (UNHRC, 2011, GPs 20-21). This may be done in a variety of ways, including through formal and informal public reporting, in-person meetings, online dialogues, and consultations with affected rights-holders. Information provided should be: (i) published in a format, and with a frequency, matching the scope and severity of impacts, and should be accessible to intended audiences (for example, company communications should be in relevant languages, address any issues of literacy amongst impacted rights-holders, and be accessible even

to remote communities affected by their activities); (ii) sufficient to permit evaluation of the adequacy of company responses to any specific impact; (iii) designed not to pose risks to rights-holders or others such as human rights defenders, journalists, local public officials or company personnel, or to breach legitimate commercial confidentiality requirements. Businesses whose operations or operating contexts pose risks of severe human rights impacts are expected to report formally (GP21).

Consistently, then, both with the rise of broader concepts of sustainability and the 'triple bottom line', and the GPs, various measures have been taken by states to encourage or require corporate reporting on human rights impacts. In France, for example, 'soft' obligations mandating social reporting by publicly-listed companies, according to which they should either report according to a set of qualitative and quantitative indicators on issues such as employee contracts, working hours, pay, industrial relations, health and safety, disability policies, community relations and environmental reporting, or explain why they are not so reporting, were first introduced in 2001. These were further strengthened, and human rights included amongst the topics on which companies should report, with explicit reference made to the GPs in connection with this step, in 2012 (République Française, 2012; French Ministry of Foreign Affairs and International Department, n.d.). Also in 2012, a pre-existing 'soft' non-financial reporting duty for the largest 1100 companies and Danish state-owned enterprises dating from 2009 was extended, with the introduction of new requirements for the same class of companies to report specifically on business respect for human rights, as well as climate change (Danish Government, 2012).[5] Norway enacted, in 2013, legislation requiring companies to report on steps to integrate considerations for human rights into their strategies (KPMG, 2013), whereas the UK introduced a requirement on all companies to prepare a "Strategic Report" amongst others disclosing their "position, performance and future direction" relating to human rights, in the same year (United Kingdom, 2013).

In 2014, after prolonged debate, the European Union (EU) adopted a new Directive requiring Member States to implement non-financial reporting legislation based on a "report or explain" approach, not dissimilar to the French and Danish models described above (EU, 2014; European

Coalition for Corporate Justice, 2014). Under the Directive, "public interest enterprises" with more than 500 employees are to be required by national law to report annually on their principal risks in relation to human rights, the environment and social impacts linked to their operations, relationships, products and services, as well as aspects related to bribery and diversity[6]. They should provide information on relevant policies, any due diligence procedures for identifying, preventing and mitigating risks identified, and significant incidents occurring during the reporting period. If the Directive has been welcomed as a step towards greater corporate accountability (European Coalition for Corporate Justice, 2014), it has also been criticised *inter alia* for its narrow scope, given that in principles it covers only approximately 6,000 of 42,000 large companies incorporated in the EU[7]; its potentially wide-ranging exemptions in relation to information that should be disclosed[8]; a weak clause on supply chains, notwithstanding this is a high risk area for many companies, that requires reporting only "when relevant and appropriate"; and the failure to provide for monitoring or mechanisms to sanction defaults by companies. On the contrary, auditors need only indicate whether non-financial information has been provided, or not (European Coalition for Corporate Justice, 2014).

One further criticism levelled at the Directive is that it failed to establish a mandatory common reporting framework or indicators; rather, it mandates the European Commission to publish, within two years, non-binding guidelines on a methodology for reporting, including general and sector non-financial Key Performance Indicators (EU, 2014). However, this approach may be thought understandable, at least in relation to human rights, given that "private" frameworks and guidance on corporate sustainability reporting have already provided such guidance for some time, and have further elaborated these in response to the GPs. The Global Reporting Initiative (GRI), for example, which has provided basic guidance on reporting on human rights since 2006,[9] expanded its standard for human rights reporting in line with the GPs in 2011. Under the new guidance, a company is now counseled to report on: (i) material issues, namely, those relevant to the human rights impacts of the company or operation, considering its sector and location; (ii) human rights due diligence, that is, the company's human rights policy, assessment process; allocation of responsibilities for human rights within the organisation; (iii) measures to promote human rights awareness, such as training; (iv) monitoring of impacts of company activities; (v) and

company measures to follow-up and remediate any human rights impacts detected (GRI, 2011). The framework includes a broad-ranging set of performance indicators that allow the effectiveness of a company's human rights due diligence processes and remediation to be measured (GRI, 2013b). Human rights risks are further integrated into GRI's ten 'Sector Supplements', versions of the general reporting framework tailored to specific industries, such as Airport Operators, Mining and Metals, Media, Event Organisers, Electrical Utilities and also NGOs (GRI, n.d.). In addition, UNICEF has provided advice on how to integrate child rights into reporting under the GRI Framework (United Nations Children's Fund (UNICEF), 2014). The Global Compact, furthermore, requires participants to include human rights within the scope of the annual *Communication on Progress,* providing a range of supporting tools and guidance (United Nations Global Compact, n.d.a., n.d.b).

Doubts are however still expressed about the value of current reporting practice as an accountability mechanism in relation to human rights. It is often thought that the businesses that most need to report on human rights may be reluctant to do so, given commercial sensitivities, potential legal liability, and the likelihood of reputational damage (Marquis, Toffel and Zhou 2011; Preuss and Brown, 2012). A 2009 survey of corporate reports undertaken for the GRI and the UNGC identified some creative approaches by companies to human rights reporting but concluded that, overall, corporate human rights reporting was weak with regard to the criteria of balanced reporting (that is, presentation of both positive and negative aspects of an issue), completeness, and inclusion of the most relevant issues (Umlas, 2009). If the development of universal human rights indicators is seen by some as crucial for comparability across company reports, the potential for irrelevance, perverse outcomes and selectivity is emphasised by others (de Felice, 2015). Equally, while civil society actors are at the forefront of calls for mandatory sustainability reporting requirements, they frequently criticise published reports as instruments for "green-" or "blue-washing", the presentation of an unduly favourable image of company impacts on people and the environment, following from a selective approach to what information is communicated (Adams, 2004; Horiuchi and Schuchard, 2009; Gray, 2010; Boesso *et al*., 2013). Civil society actors furthermore resist the role, into which some governments have tried to encourage them, of

monitoring the content and quality of corporate non-financial reports, given the resource implications such a task entails (The Landmark Project, 2012).

Independent assurance of corporate sustainability reports has been proposed as one solution to this dilemma (SHIFT, n.d.). The GPs maintain that "independent verification of human rights reporting can strengthen its content and credibility" (UNHRC, GP21). But the quality and reliability of assurance has also been questioned (Fonseca, 2010; O'Dwyer et al., 2011; Kaspersen and Johansen, 2014), with many human rights advocates insisting that only worker-based approaches to monitoring can be trusted (Electronics Watch, 2014; Workers' Rights Consortium, 2016). Ultimately, then, in this complex area, it seems likely that a more potent mixture of mandatory disclosure rules, credible independent assurance, and continuing, enhanced investor and civil society scrutiny of company information will be needed if reporting's potential as a lever to improve corporate sustainability and business respect for human rights is to be realised.

7. Conclusion

The GPs assert the corporate responsibility to respect human rights as a free-standing, universally-applicable minimum standard of business conduct, driven by social expectations, but based on international law. Though it may arguably be criticised for being a legal 'fudge', its hybrid status can perhaps be understood, and forgiven, as a necessary compromise: it recognises, simultaneously, the enduring role of states as *de jure* duty bearer under human rights standards, but also the ethically unacceptable limitations of the latter, given the still state-centric structure of international law, and the harmful externalities affecting people and planet of globalisation's governance 'gaps'.

As discussed in this article, the corporate responsibility to respect human rights expressed in Pillar 2 of the GPs embodies the culmination of significant progress in the sphere of corporate accountability over recent decades, while also being a catalyst for its further development. Based on the corporate responsibility to respect human rights, a plethora of innovations in regulation and praxis are now unfolding, led by actors in government and the corporate sector, amongst CSOs, labour unions and others, in the areas of human rights due diligence, impact assessment

and reporting. Yet overall, change is slow and partial, and results achieved are still unsatisfactory: severe business-related human rights abuses remain endemic in many industry sectors and in many countries. If it is too soon to draw any firm conclusions regarding the 'true' impact of the second Pillar on corporate norms and conduct, this consideration weighs in favour of its constant critique, careful qualification of claims of 'progress', and the maintenance of a watchful eye on whether the current combination of approaches to its implementation is fit for purpose.

[1] The International Bill of Rights comprises the Universal Declaration of Human Rights (UN General Assembly, 1948), the International Covenant on Civil and Political Rights (UN General Assembly 1966a) and the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966b).

[2] Note, 19 of the companies surveyed (11%) were dual listed in the US and Europe, and so directly impacted by Dodd Frank Act Section 1502.

[3] The French legislative proposal would require large companies to establish and maintain an effective "vigilance plan," including reasonable measures to identify and prevent risks of human rights abuses resulting from the company's activities, and those of any companies it controls, directly or indirectly, as well as from activities of their subcontractors or suppliers (Assemblée Nationale, 2016).

[4] The list does not include company policies referring only to employees or suppliers (Business and Human Rights Resource Centre n.d.a.).

[5] Overall, under the Danish legislation, members of the relevant class of companies should report on their social responsibility policies, how these are translated into action; and what has been achieved through them during the financial year, or, alternatively, indicate that they are not reporting. The social impact information can be incorporate either directly in the company's annual financial statement, in a separate corporate sustainability report, via a company website or a UN Global Compact "Communication on Progress" (UNGC, n.d.a.). CSR reports are subject to a consistency check by auditors under the Danish Financial Statements Act §135, and the Danish Business Authority, at least up until 2013, periodically evaluated the effectiveness of the reporting requirement, also providing guidance on implementation for companies and auditors, who in turn award prizes for the best CSR reports (Danish Government, 2011).

[6] Public interest entities (PIE) are defined as listed companies, credit institutions, insurance undertakings and any other entity designated by an EU Member State as a PIE. In providing information, companies are to be guided by the GPs, the UN Global Compact, OECD Guidelines for MNEs and the ILO Tripartite Declaration on principles concerning multinational enterprises and social policy, and risks are to be disclosed regardless of what a company considers relevant or "material" to the interests of its shareholders (EU, 2014).

[7] It is of course open to countries to go beyond the minimum obligations contained in the Directive and extend reporting obligations to a larger class of companies, if they so desire.

[8] For instance, the Directive excludes from the obligation to report information relating to "impending developments" or where disclosure would be "seriously prejudicial" to a company's commercial position (EU, 2014).

[9] The GRI is an international not-for-profit organisation. Its Sustainability Reporting Framework, developed through a multi-stakeholder process, comprises Reporting Guidelines, Sector Guidance and other resources that provides "metrics and methods for measuring and reporting sustainability-related impacts and performance" (GRI, n.d.). The number of European enterprises using the GRI Framework rose from 270 in 2006 to over 850 in 2011 (Adams, 2004). Along with the International Federation of Accountants, the GRI participates in the International Integrated Reporting Council, which aims to establish an internationally accepted, unitary framework for integrated financial and sustainability reporting (International Integrated Reporting Council, n.d., de Villers *et al* (2014).

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Corresponding author
Claire Methven O'Brien can be contacted at: cob@humanrights.dk.